

National Transportation Safety Board

§ 821.21

any deposition shall be in compliance with the provisions of section 1004 of the Act.

(b) *Exchange of information by parties.* At any time before hearing, at the instance of either party, the parties or their representatives may exchange information, such as witness lists, exhibit lists, curricula vitae and bibliographies of expert witnesses, and other data. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned) may issue an order directing compliance with any ruling made with respect to discovery. Any party may also use written interrogatories, requests to admit, or other discovery tools. Copies of discovery requests and responses shall be served on the law judge assigned to the proceeding.

(c) *Use of the Federal Rules of Civil Procedure.* Those portions of the Federal Rules of Civil Procedure that pertain to depositions and discovery may be used as a general guide for discovery practice in proceedings before the Board where appropriate. The Federal Rules and the case law that construes them shall be considered by the Board and its law judges as instructive rather than controlling.

(d) *Failure to provide or preserve evidence.* The failure of any party to comply with an order of an administrative law judge compelling discovery or to cooperate in a timely request for the preservation of evidence may result in a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, or dismissal.

[49 FR 28250, July 11, 1984, as amended at 59 FR 59047, Nov. 15, 1994]

§ 821.20 Subpoenas, witness fees, and appearances of Board Members, officers, or employees.

(a) *Subpoenas.* Subpoenas requiring the attendance of witnesses or the production of documentary or tangible evidence for the purpose of taking depositions or at a hearing may be issued by the chief law judge prior to the assignment of a law judge, or by the law judge to whom the case is assigned, upon application by any party. The application shall show the general rel-

evance and reasonable scope of the evidence sought. Any person upon whom a subpoena is served may, within 7 days after service but in any event prior to the return date thereof, file with the chief law judge or the law judge, as the case may be, a motion to quash or modify the subpoena, and such filing shall stay the subpoena pending final action by the chief law judge or the law judge on the motion.

(b) *Witness fees.* Witnesses shall be entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. The fees shall be paid by the party at whose instance the witness is subpoenaed or appears. The Board may decline to process a proceeding further should a party fail to compensate a witness pursuant to this paragraph.

(c) *Board Members, officers, or employees.* In order to encourage a free flow of information to the Board's accident investigators, the Board disfavours the use of its personnel in enforcement proceedings. Therefore, the provisions of paragraph (a) of this section are not applicable to Board Members, officers, or employees, or the production of documents in their custody. Applications for the attendance of such persons or the production of such documents at hearing shall be addressed to the chief law judge or the assigned law judge, as the case may be, in writing, and shall set forth the need of the moving party for such testimony, and a showing that such testimony is not now, or was not otherwise, reasonably available from other sources. The law judge shall not permit such testimony or documentary evidence to include any opinion testimony, or any account of statements of a respondent, made during the Board's investigation of any accident.

[40 FR 30243, July 17, 1975, as amended at 59 FR 59048, Nov. 15, 1994]

§ 821.21 Official notice.

Where the law judge or the Board intends to take official notice of a material fact not appearing in the evidence in the record, notice shall be given to all parties, who may within 10 days file a petition challenging such fact. Upon the filing of such petition, the party or parties shall be given reasonable opportunity to controvert the fact.